SUPREME COURT, U. S.
SEP 13 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-106

ALBERTO-CULVER COMPANY, LEONARD H. LAVIN & COMPANY and CAPITOL PACKAGING CO.,
Petitioners,

vs.

LA MAUR INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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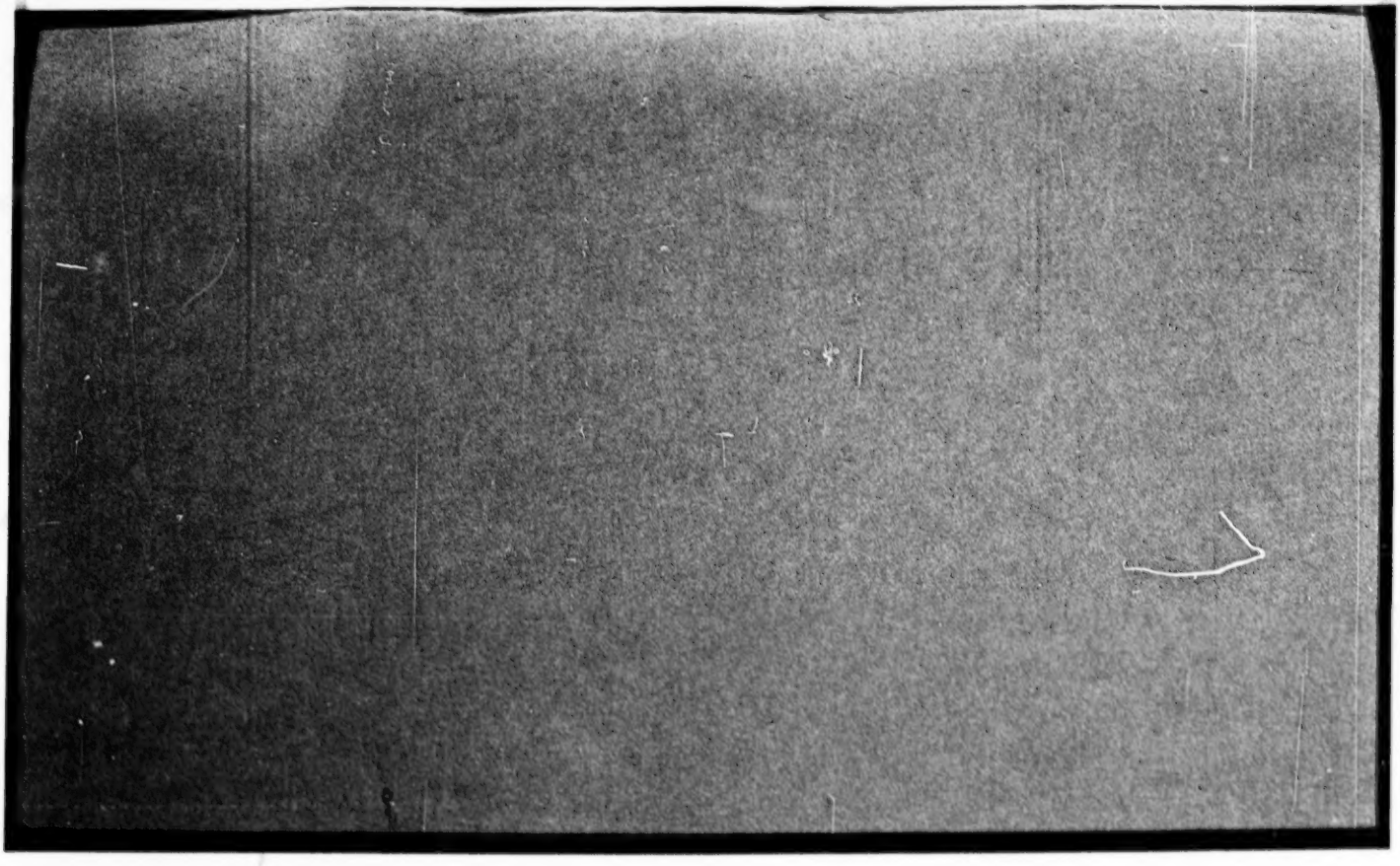


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BRIEF FOR RESPONDENT IN OPPOSITION

I.

OPINIONS BELOW

The opinion of the District Court (Pet. App. A1-A22)[1] is reported at 179 U.S.P.Q. 607, except for an addendum thereto, which is printed in the Appendix to this brief (Resp. App. A-23). The opinion of the Court of

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[1] "Pet. App. —" designates the Appendix printed in the back of the Petition; "Res. App. —" designates the Appendix printed in the back of this brief; and "Pet. —" designates the Petition filed herein. Petitioner Alberto-Culver Company and Respondent La Maur Inc. are referred to herein as "Alberto-Culver" and "La Maur" respectively.

Appeals (Pet. App. A23-A24) is reported at 496 F.2d 618, 182 U.S.P.Q. 10.

II.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition (Pet. 2).

III.

QUESTIONS PRESENTED

1. May a litigant raise for the first time in his Petition for a Writ of Certiorari the argument that, as a matter of public policy, the owner of long-standing trademark rights in an ordinary English word should not be permitted to enjoin a competitor from using that word as part of any other brand name because of the claimed impact such an injunction would have on competition, when the litigant failed to raise that issue by his pleadings, proof or arguments in the courts below and where he made no showing that the enforcement of such trademark rights would in any way inhibit the litigant's ability to compete with the trademark owner?

2. If the answer to Question 1 is in the affirmative, is the owner of a family of federally registered, nondescriptive trademarks, which, although based on an ordinary English word, have gained a secondary meaning in the consumer mind not diluted by third party uses in their area of exploitation, lawfully entitled to protection from the knowing use on related goods by a competitor of a trademark likely to cause confusion among consumers?

3. Does a litigant have standing to assert an antitrust

claim which has been pled offensively only, when he has failed to show any present or threatened loss or damage as a result of the practices complained of?

4. If the answer to Question 3 is in the affirmative, is there any evidence in the present case to support petitioners' claim that respondent used its trademarks and registrations to obtain exclusive supply agreements from third parties?

IV.

STATUTES INVOLVED

The pertinent provisions of the relevant statutes are set forth in the appendix to the Petition (Pet. App. A26-A30), except for those of 15 *U.S.C.* §§1057(b) and 1114 (1). Section 1057(b) provides:

> "A certificate of registration of a mark upon the principal register provided by this chapter shall be prima facie evidence of the validity of the registration, of registrant's ownership of the mark, and of registrant's exclusive right to use the mark in commerce in connection with the goods or services specified in the certificate, subject to any conditions and limitations stated therein."

Section 1114(1) reads as follows:

> "Any person who shall, without the consent of the registrant—
>
> > (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.

shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) of this section, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive."

V.

STATEMENT OF THE CASE

This is an ordinary trademark infringement action involving the usual issues of validity and infringement. The case presents neither unsettled questions of law nor, indeed, any issues of importance to anyone except the parties involved. It is not unlike the myriad other trademark cases where this Court has denied certiorari.[2]

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[2]See *e.g.*, *Seven Up Co. v. Cheer Up Sales Co.*, 148 F.2d 909 (8th Cir. 1945), *cert. denied* 326 U.S. 727 (1945); *National Lead Co. v. Wolfe*, 223 F.2d 195 (9th Cir. 1955), *cert. denied* 350 U.S. 883 (1955); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F.2d 149 (9th Cir. 1963), *cert. denied* 374 U.S. 830 (1963); *Watkins Products, Inc. v. Sunway Fruit Products, Inc.*, 311 F.2d 496 (7th Cir. 1962), *cert. denied* 373 U.S. 904 (1963); *Turner v. HMH Publishing Co.*, 380 F. 2d 224 (5th Cir. 1967), *cert. denied* 389 U.S. 1006 (1967); *Aloe Creme Labs. v. Milsan, Inc.*, 423 F.2d 845 (5th Cir. 1970), *cert. denied* 398 U.S. 928 (1970); *Electronic Communications, Inc. v. Electronic Components for Industry Co.*, 443 F.2d 487 (8th Cir. 1971), *cert. denied* 404 U.S. 833 (1971); *Wurzburger Hofbrau Aktien v. Schoenling Brewing Co.*, 331 F. Supp. 497 (S.D.Ohio 1971), *aff'd per curiam* 175 U.S.P.Q. 391 (6th Cir. 1972), *cert. denied* 409 U.S. 1042 (1972).

The trial court's memorandum decision (Pet. App. A1-A22) contains extensive findings of fact on the pertinent issues, many, if not most, of which were arrived at only as a result of weighing conflicting testimony given by witnesses who appeared before the trial court and whose demeanor he could observe. The Court of Appeals' decision fully concurred in all these findings (Pet. App. A23-A24). Since the Petition ignores the findings hostile to petitioners' present arguments, respondent is compelled to briefly summarize the findings which support the Court of Appeals' affirmance herein.

A. Nature of the Case and its Disposition Below

The nature of the case and its disposition below are adequately set forth in the Petition (Pet. 3-6).[3]

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[3]Certain misstatements in this section of the Petition must be corrected:

First, the essence of La Maur's infringement claim was that Alberto-Culver knowingly launched its infringing product in the midst of a whole family of La Maur STYLE and STYLE-related products. The members of La Maur's STYLE family of products in the chemical hair preparation field are depicted in the appendix to this brief. (Res. App. A-1 through A-20). Thus, Petitioners' photographic display of a box of BLONDES AMERICAN STYLE side-by-side with a single can of STYLE hair spray (Pet. 4-5) does not accurately portray the situation presented for decision.

Secondly, Petitioners' suggestion that La Maur always displays its STYLE trademarks in a fanciful script form (Pet. 3) is contrary to the evidence (see e.g., Res. App. A-8, A-12 and A-20) and the trial court's findings. (Pet. App. A17 n. 22).

Finally, Petitioners' statement that the private label brand names are "owned" by the private label customers (Pet. 3 n. 1) was refuted by the uncontradicted trial testimony that private labels offered to the trade generally, belong to the private label sellers and not to the private label customers.

B. The Relevant Facts

1. History of La Maur's STYLE and STYLE-related Family of Trademarks

a. Adoption and Expansion

La Maur has been involved in the creation, manufacture and distribution of hair care products since the 1930's (Pet. App. A2). In the summer of 1945, La Maur first adopted the STYLE trademark and applied it to a bottled setting lotion, which it sold in modest quantities until 1950 (Pet. App. A5). In 1951 La Maur developed a water soluble aerosol hair spray which was commercially introduced under the brand name STYLE in 1952 and has ever since been nationally marketed by La Maur under that brand name (Pet. App. A4-A5). As the industry's first water soluble aerosol hair spray, La Maur's product STYLE created a large amount of interest throughout the industry and was immediately recognized and increasingly successful (Pet. App. A4). STYLE has for some time been and continues to be one of the most popular hair sprays in the United States.

In view of its significant success with STYLE hair spray, La Maur began introducing other products under the STYLE and STYLE-related trademarks. The current members of the STYLE family of products in the chemical hair preparation field include professional and retail hair sprays, setting gels and lotions, permanent waves and neutralizers, conditioners, shampoos and creme rinses (Pet. App. A2; Res. App. A-1 through A-20). La Maur's combined professional and retail sales of products under the STYLE and STYLE-related trademarks at the time of trial was in excess of $123,000,000.

b. Trademark Registrations in Suit

On April 10, 1958, La Maur applied to the United States Patent Office to register the trademark STYLE, relying on a date of first use of June 5, 1945. After La Maur succeeded in cancelling the STYLE-TEX registration previously issued to the Wella Corporation,[4] the Patent Office issued La Maur's first STYLE registration on July 23, 1963. As La Maur brought out additional products bearing STYLE or STYLE-related trademarks, it applied for and was granted additional registrations. La Maur introduced at trial certified copies of three separate STYLE registrations, and registrations for MR. STYLE, TEEN STYLE, STYLE BRIGHT, STYLAST, STYLIST, STYLETTE and STYLAC (Pet. App. A2).

c. Prior Litigation Involving STYLE Trademarks

Up to the present case, the most significant infringer of the STYLE marks had been Revlon, Inc., whose use of STYLE AND SET on a hair spray and SET & STYLE on a setting lotion was enjoined in *La Maur Inc. v. Revlon, Inc.*, 245 F. Supp. 839 (D. Minn. 1965). The only other significant infringement case prior to the one at bar was terminated in 1965 when a consent decree was entered in *Smith v. DeMert & Dougherty, Inc.* (No. 62 C. 893, N.D. Ill. 1965), which enjoined the use by DeMert & Dougherty of the trademark STYLE or any colorable imitation thereof, but specifically excluded from its coverage:

> "(ii) The placing on labels by defendants of the word 'style' used in a descriptive manner and not as a trademark for a hair spray.

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[4]See *Wella Corporation v. La Maur Inc.*, 312 F.2d 831 (C.C.P.A. 1963).

"(iii) The use of the word 'style's' or a similar word or term where the word or term is clearly used to constitute an advertisement for a particu'ar beauty shop and not a trademark for a hair spray."

(Pet. App. A8-A9 n. 9). Recently, La Maur has also successfully opposed three separate applications to register STYLE-related trademarks in the United States Patent Office: STYL-LIFT applied to a non-electrical multi-pronged tool for arranging hair;[5] STYLE-TENDER applied to hairnets;[6] and ITALIAN STYLE applied to cosmetics.[7]

2. Consumer Recognition of La Maur's STYLE and STYLE-related Trademarks

a. Advertising and Promotion

La Maur produced a "superabundance" of evidence relating to the amount of advertising and promotion it had engaged in over the years (Pet. App. A10 n. 11). At the time of trial, the portion of the La Maur's advertising and promotion expense attributable to the advertising and promotion of STYLE and STYLE-related products had grown to a figure in excess of $20.000.000. Based upon the oral and documentary evidence before him, the trial court concluded that the effectiveness of La Maur's promotional efforts could not be questioned (Pet. App. A9).

b. Customer Recognition

The testimony at trial overwhelmingly demonstrated that STYLE hair spray is a "recognized consumer item" and

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[5]*La Maur Inc. v. Cournoyer Industries, Inc.*, 167 U.S.P.Q. 476 (T.T.A.B. 1970).

[6]*La Maur Inc. v. Richard Gregg Mfg. Co.*, 167 U.S.P.Q. 510 (T.T.A.B. 1970).

[7]*La Maur Inc. v. Matney*, 167 U.S.P.Q. 559 (T.T.A.B. 1970).

that the other products in La Maur's STYLE and STYLE-related family of marks, although "newer products," have "growing sales" and are identified by consumers "with the more popular spray" (Pet. App. A9-A10).

3. Evidence Showing Likelihood of Confusion

a. Alberto- Culver's Adoption of BLONDES AMERICAN STYLE

In 1970, almost a quarter of a century after La Maur's first use of STYLE, Alberto-Culver, a company manufacturing dozens of products bearing registered marks and "not uneducated as to trademark law" (Pet. App. A17), adopted the name BLONDES AMERICAN STYLE under circumstances showing that it "was aware that it ran the risk of infringing" La Maur's STYLE marks (Pet. App. A18). First, Alberto-Culver made an abortive attempt to acquire La Maur by merger, recognizing during the course of the negotiations that "La Maur's primary product line centered around the 'Style' brand name" (Pet. App. A18). Then, while the acquisition negotiations were still active, Alberto-Culver applied to the Patent Office to register CURL 'N STYLE applied to a hair spray. The Patent Office refused to even pass CURL 'N STYLE for publication on the ground that its use wou'd cause confusion with La Maur's STYLE marks (Pet. App. A-17-A18). Despite the fresh refusal of the Patent Office to register CURL 'N STYLE,[8] its knowledge that La Maur's primary trademark was STYLE, and the list of La Maur's STYLE marks found

[8]Alberto-Culver was not even free at trial to argue that it had forgotten about the CURL 'N STYLE application since one of the trademark searches it ordered for BLONDES AMERICAN STYLE not only revealed La Maur's family of STYLE products but also listed Alberto-Culver's CURL 'N STYLE application.

in its BLONDES AMERICAN STYLE trademark searches, Alberto-Culver went ahead and adopted a name which incorporated the whole of La Maur's principal trademark (Pet. App. A18). Significantly, Alberto-Culver made no effort to register the infringing mark. (*Ibid.*)

b. Similarity of Marks and Goods

The evidence showed that the BLONDES AMERICAN STYLE brand and La Maur's STYLE and STYLE-related names were in fact "similar marks" used on "similar products" (Pet. App. A11). The marks were so similar and the products so related that "consumers could reasonably believe that the manufacturer of 'Style' products had expanded its line to include a bleach and toner" (Pet. App. A18). The likelihood of confusion was enhanced by the industry practice of offering a family of products under the same or related names (Pet. App. A10).

VI.

ARGUMENT

Nowhere in their Petition do petitioners claim that any of the trial court's findings, all of which were concurred in by the Court of Appeals, is clearly erroneous under the standard for review set forth in Rule 52(a), *Federal Rules of Civil Procedure*. Indeed, under the so-called "two-court rule,"[9] such a claim would be of no avail. Thus, petitioners' public policy arguments must be considered

[9] "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949). *Accord: Great Atlantic & Pacific Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 153 (1950).

against the background of the facts found below. These arguments cannot survive examination in the light of the trial court's extensive findings herein.

A. Petitioners' Failure to Ventilate Their Brand Name Monopoly Claim in the Courts Below Bars Its Assertion on Petition for Writ of Certiorari

Petitioners' argument that the owner of a federally registered trademark which consists of a common word in the relevant industry should not be permitted to prevent competitors from using that common word as part of any other brand name is raised for the first time in the Petition for a Writ of Certiorari. Although petitioners did allege in their first affirmative defense that "plaintiff may not pre-empt or monopolize all manner of use of the word 'style' and variations thereof and may not exclude the use by defendants of the word 'style' as part of the unitary phrase, 'Blondes American Style' " (Paragraph 22 of Answer). this was done in the context of an attempt to show that "plaintiff's rights in the word 'style', were 'narrow and weak' " (Paragraph 21 of Answer). This argument was rejected by the courts below (Pet. App. A12 n. 15). Petitioners' claim in its brief to the Court of Appeals that "the district court treats La Maur's trademark rights as a monopoly in the word 'style' and never addresses itself to the fact that Alberto-Culver's trademark 'Blondes American Style' does not resemble La Maur's 'style' trademarks in sound, appearance or meaning," was couched in the general context of the trial court's claimed application of improper criteria for determining trademark confusion. This claim was noted and rejected by the Court of Appeals (Pet. App. A24). Petitioners never argued on

public policy grounds in the courts below that La Maur could not under any circumstances prevent a competitor from using its trademark as part of any other brand name because their trademark consisted of "an extraordinarily common word in the relevant industry." Having failed to raise that claim below, petitioners are not free to assert it in this Court.

B. The Courts Below Have Granted Respondent No Brand Name Monopoly in the Word "Style" Beyond That Permitted By The Lanham Act

Petitioners' argument that the writ of certiorari should be granted to review the question whether a trademark owner should be granted a brand name monopoly in a word commonly used in the relevant industry is pegged upon three underlying premises: (1) that a so-called "brand name monopoly" would inhibit the ability of other manufacturers to compete with the trademark owner; (2) that the effect of the rulings of the courts below is to give La Maur such a monopoly in the word "style"; and (3) that this Court's ruling in *American Steel Foundries v. Robertson*, 269 U.S. 372 (1926), established the principle that no one, by adopting a commonly used word as a brand name, may withdraw it from public use as a trademark, a principle which was beclouded by the adoption of the Lanham Act. The first and second premises are wrong as a matter of fact. The third is wrong as a matter of law.

1. First Faulty Premise

The cornerstone of petitioners' "brand name monopoly" argument is the proposition that La Maur's right to prevent

other hair care manufacturers from using brand names incorporating the word "style" will "clearly inhibit the ability of others to compete in that industry by depriving them of an apt means of suggesting to the public through the use of trademarks what their product is or hopefully will do" (Pet. 14-15). This proposition simply begs the question. Petitioners offered not a scintilla of evidence that the enforcement of La Maur's trademark rights would in any way inhibit the ability of other manufacturers in the hair care industry to compete with La Maur. To the contrary, the evidence revealed that Alberto-Culver itself has been far more successful in terms of sales, without using any trademark containing the word "style," than La Maur has been, even though La Maur possesses certain trademark rights in that word. Thus, petitioners' proposition that a "brand name monopoly" would inhibit the ability of other manufacturers to compete with La Maur has no support in the present record.

2. Second Faulty Premise

The second premise upon which petitioners' Lanham Act argument is pegged is epitomized by their mischaracterization of the lower courts' holding (Pet. 14):

> "In the present case, the lower courts have acknowledged that the word 'style' is 'an extraordinary [*sic.*] common term in the hair care . . . industry,' but held that La Maur is entitled to withdraw such common word from public use as a trademark because of its 'substantially exclusive use' (i.e., secondary meaning) in a very limited area of the market."

Although the lower courts did in fact hold that La Maur's

marks had achieved a secondary meaning in the chemical hair preparation segment of the hair care industry,[10] the courts did not hold that, as a result, La Maur could prevent the public, or even other members of the hair care industry, from using the word "style" as a trademark. The trial court made it abundantly clear that La Maur's marks were entitled to protection only in the narrow area where they had been exploited by La Maur and had achieved a secondary meaning. For example, in the passage of the trial court's opinion partially quoted by petitioners (Pet. 14), the court said in full (Pet. App. A8):

> " 'Style' is an extraordinarily common term in the hair care or, for that matter, any fashion-oriented industry. However, even words in common parlance may gain trademark recognition and legal protection under the secondary meaning doctrine. (Citation). When the public attributes to a mark a connection with a certain product or group of products, that mark has gained secondary meaning within the respective product area, prohibiting would-be users of the mark *in that area.*" (Emphasis by the court).

On this basis, the trial court held that La Maur enjoys no control over the use of the term "style" in the "dry" products segment of the hair care industry (Pet. App. A12) nor over the use of truly descriptive forms of "style" (Pet. App. A13). Finally, in the portion of its opinion dealing with petitioners' antitrust claims, the court made it crystal clear that La Maur's rights in "style" were not limitless (Pet. App. A19):

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[10]The trial court held (Pet. App. A18):

> [T]he 'Style' family of products have gained a secondary meaning in the consumer mind not diluted by third party uses *in its respective area of exploitation* * * * ." (Emphasis added).

> "It is clear that any owner of a patent or a trademark is entitled to protect its registered rights through negotiation and litigation. Such actions on the part of a trademark owner may create and strengthen the potential monopoly which a trademark registration affords the registrant, but such a monopoly is legally sanctioned and not within the scope of those arrangements deplored by the antitrust laws. (Citation). Of course, malicious or excessive threats which go to companies whose activities could not possibly be considered as infringing upon the registrant's respective area of exploitation might be construed as an effort to extend a trademark monopoly beyond its legal limits."[11]

The trial court's decision limited protection of La Maur's marks to the chemical hair preparation field.[12] Significantly, it is in this very field that Alberto-Culver introduced the infringing product.[13] Thus, petitioners' premise that the courts below granted La Maur a brand name monopoly in the word "style" is without foundation in fact.

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[11]Alberto-Culver in its third affirmative defense charged La Maur with making such excessive threats. The trial court specifically held that Alberto-Culver failed to establish this defense. (Res. App. A-23).

[12]Having established that its marks were registered on the principal register provided for by the Lanham Act, La Maur was entitled to the "exclusive right to use the mark in commerce in connection with the goods and services specified in the [registration] certificate." 15 U.S.C. § 1057 (b).

[13]BLONDES AMERICAN STYLE is a retail chemical hair preparation aimed at the female trade. Of the fifty-one purported examples of "current brand name usage of 'style' by third parties" listed by petitioners (Pet. 7), only eleven are chemical hair preparations. Not one of the eleven is a retail product aimed at the female trade. Thus, contrary to petitioners' claim (Pet. 14), the word "style" is not used "as part of innumerable brand names" in the chemical hair preparation field. The trial court held that "the uses of the name 'style' presented by defendant do not infringe on the substantial exclusivity which La Maur products enjoy in the chemical hair care preparation area of the hair care industry." (Pet. App. A12).

3. Third Faulty Premise

The third premise upon which petitioners' Lanham Act argument is pegged is petitioners' notion that "the lower courts, relying on the Lanham Act, have reached" a result contrary to this Court's decision in *American Steel Foundries v. Robertson, supra* (Pet. 13). This premise is clearly without foundation in law.

In the *American Steel Foundries* opinion, this Court recognized the secondary meaning doctrine (296 U.S. at 383):

> "There may be, of course, instances where a single word in the corporate name has become so identified with the particular corporation that whenever used it designated to the mind of the public that particular corporation."

This statement of the doctrine is not different in substance from the provision of Section 2(f) of the Lanham Act. 15 *U.S.C.* § 1052(f) (Pet. App. A28), which provides that "nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce." Since the courts below held that "the 'Style' family of products have gained a secondary meaning" (Pet. App. A18), the result in this case is the same whether the Lanham Act or this Court's pre-Lanham Act *American Steel Foundries* decision is applied. Thus, petitioners' third premise for their Lanham Act argument is without foundation in law.

C. The Courts Below Properly Rejected Petitioners' Claim That La Maur Used Its "Style" Trademarks to Obtain Exclusive Supply Agreements From Third Parties

Petitioners' argument that the writ of certiorari should be granted to review the question whether La Maur's use of its "Style" trademark and federal registrations to obtain exclusive supply agreements from third parties is against public policy and a violation of the Sherman Act (Pet. 16-20), is based exclusively upon the construction of the so-called "consent forms" utilized by La Maur in its private label business.

Apparently believing that the quotation of the language of the "consent form" would be fatal to their argument, petitioners chose to paraphrase it as follows (Pet. 16):

> "We own a federally registered trademark which may be infringed by your mark or descriptive usage. We will not object to your use if you agree to purchase from us all future goods to be sold under your private labels."[14]

The actual language employed by La Maur in the "consent form" bears little resemblance to this paraphrase. It reads:

> "The use of this label is consented to by La Maur Inc. only when the product is purchased from Aerosol Industries, a division of La Maur Inc."

In the face of the clear language of the "consent form" and the evidence at the trial revealing that the form does

[14]Notwithstanding the fact that the above-quoted material was indented and set off by quotation marks in the Petition, counsel for petitioners informed the Court by letter dated August 20, 1974 that the statement did not purport to be a quotation from the record and that the quotation marks should be stricken.

not in fact prevent a private label customer from having any particular label filled by a competitor, the courts below concluded that the "consent form" was adopted to protect La Maur "from accusations that it has acquiesced in the use of its trademarks by others" (Pet. App. A14 n. 17; A20-A21). Thus, petitioners' claim that the "consent form" amounts to an "exclusive supply contract" was rejected by the courts below on factual grounds.

Assuming *arguendo* that the "consent forms" amounted to exclusive supply contracts, the issue would still not be properly before this Court. Contrary to petitioners' claim (Pet. 19), this issue was not pled defensively.[15] The allegations appear only as part of Count III of petitioners' counterclaim. As a result of the practices complained of in Count III, Capitol Packaging Company claimed two types of injury: (1) a foreclosure from competing for the private label business of any hair care business desiring to describe its hair spray by employing some descriptive form of "style"; and (2) a foreclosure from competing for the private label business of those hair care businesses which use the word "style" or some variation thereof in their business names. In dismissing Count III, the courts below concurred in finding that Capitol Packaging Company failed to establish a present or threatened foreclosure in either regard (Pet. [illegible] A21) and, therefore, failed to establish the harm requisite to recovery under "any" of the antitrust laws. (*Ibid.*) Petitioners, therefore, lack standing to assert their antitrust argument in this Court.

[15]Although the claim asserted in Count II of petitioners' counterclaim was pled defensively as part of the third affirmative defense, petitioners never pled defensively the allegations contained in Count III of the counterclaim. If, however, the allegations of the third affirmative defense are deemed broad enough to encompass the matters pled in Count III, then the courts below rejected those allegations on the merits. (Res. App. A-23).

VII.

CONCLUSION

No one of the various considerations governing review on certiorari enumerated in paragraph 1(b) of this Court's Rule 19 actually is present in this case. The petition is wholly without merit and should be denied.

Respectfully submitted,

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Counsel for Respondent

Of Counsel:
LEONARD, STREET AND DEINARD
Minneapolis, Minnesota
ARTHUR S. CAINE
Minneapolis, Minnesota

September 1974

RESPONDENT'S APPENDIX



Plaintiff's Ex. 2-A: STYLE hair spray--super hold (professional)

Plaintiff's Ex. 2-B: STYLE hair spray--super hold unscented (professional)

Plaintiff's Ex. 2-C: STYLE hair spray--regular hold (professional)

Plaintiff's Ex. 2-D: STYLE hair spray--regular hold unscented (professional)



Plaintiff's Ex. 2-E: STYLAC hair spray (professional)



Plaintiff's Ex. 2-F: STYLE Gel--super hold (10 pound package) (professional)

Plaintiff's Ex. 2-G: STYLE Gel--regular hold (10 pound package) (professional)

Plaintiff's Ex. 2-H: STYLE Gel--super hold (1 pound package) (professional)

Plaintiff's Ex. 2-I: STYLE Gel--regular hold (1 pound package) (professional)



Plaintiff's Ex. 2-J: STYLAST hair setting lotion--regular formula (applicator bottle) (professional)

Plaintiff's Ex. 2-K: STYLAST hair setting lotion--super hold formula (applicator bottle) (professional)

Plaintiff's Ex. 2-L: STYLAST hair setting lotion--super hold formula (1 gallon) (professional)

Plaintiff's Ex. 2-M: STYLAST hair setting lotion--regular formula (1 gallon) (professional)



Plaintiff's Ex. 2-N: STYLIST hair lacquer (1 gallon) (professional)

Plaintiff's Ex. 2-O: STYLIST hair lacquer (applicator bottle) (professional)



Plaintiff's Ex. 2-P: STYLETTE cold wave (normal strength) (professional)

Plaintiff's Ex. 2-Q: STYLETTE cold wave (for bleached or tinted hair) (professional)

Plaintiff's Ex. 2-R: STYLETTE cold wave (for fine, limp hair) (professional)

Plaintiff's Ex. 2-S: STYLETTE neutralizer (1 quart) (professional)



Plaintiff's Ex. 2-T: TEEN STYLE permanent wave (professional)



Plaintiff's Ex. 2-U: STYLE firm hold permanent wave (professional)

Plaintiff's Ex. 2-V: STYLE original twin applicator permanent wave (professional)



Plaintiff's Ex. 2-Z: STYLE Support hair spray (professional)



Plaintiff's Ex. 3-A: STYLE hair spray--super hold (retail)

Plaintiff's Ex. 3-B: STYLE hair spray--regular hold (retail)

Plaintiff's Ex. 3-C: STYLE hair spray--super hold--unscented (retail)

Plaintiff's Ex. 3-D: STYLE hair spray--super hold--for color-treated hair (retail)



Plaintiff's Ex. 3-E: STYLAC hair lacquer--unscented (retail)

Plaintiff's Ex. 3-F: STYLAC hair lacquer--regular formula (retail)



Plaintiff's Ex. 3-G: STYLAST hair spray (retail)



Plaintiff's Ex. 3-H: STYLE BRIGHT hair conditioner (retail)



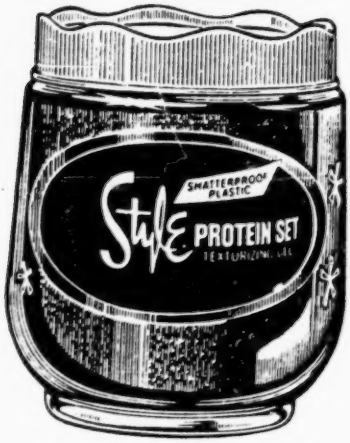
Plaintiff's Ex. 3-I: STYLE setting lotion--super hold (retail)

Plaintiff's Ex. 3-J: STYLE setting lotion--for tinted or bleached hair (retail)



Plaintiff's Ex. 3-K: STYLAST hair setting lotion--for normal hair (retail)

Plaintiff's Ex. 3-L: STYLAST hair setting lotion--for tinted or bleached hair (retail)



Plaintiff's Ex. 3-M: STYLE protein setting gel--regular formula (retail)

Plaintiff's Ex. 3-N: STYLE protein setting gel--for color-treated hair (retail)

Plaintiff's Ex. 3-O: STYLE protein setting gel--super hold (retail)



Plaintiff's Ex. 3-P: STYLE protein creme conditioner--jar (retail)

Plaintiff's Ex. 3-Q: STYLE protein creme conditioner--tube (retail)



Plaintiff's Ex. 3-R: STYLE lemon shampoo (retail)

Plaintiff's Ex. 3-S: STYLE protein shampoo (retail)

Plaintiff's Ex. 3-T: STYLE gentle golden shampoo (retail)

Plaintiff's Ex. 3-U: STYLE fresh and natural shampoo (retail)

Plaintiff's Ex. 3-V: STYLE shampoo concentrate gel--tube (retail)



Plaintiff's Ex. 3-W: STYLE fresh and natural creme rinse (retail)

Plaintiff's Ex. 3-X: STYLE lemon creme rinse (retail)

Plaintiff's Ex. 3-Y: STYLE creme rinse--tube (retail)



Plaintiff's Ex. 3-Z: STYLE instant conditioner and set (retail)



Plaintiff's Ex. 4: MR. STYLE hair spray for men (professional)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

LA MAUR INC.,

Plaintiff,

vs.

ALBERTO-CULVER COMPANY and LEONARD H. LAVIN & COMPANY,

Defendants.

PLAINTIFF'S MOTION FOR ADDITIONAL FINDINGS

File No. 4-70 Civ. 442

Pursuant to Rule 52(b), Federal Rules of Civil Procedure, plaintiff moves the Court for additional findings of fact and conclusions of law relating to defendants' third affirmative defense, as follows:

1. The complaints, demands and threats of litigation made by plaintiff La Maur Inc. to or against defendants and/or third parties respecting the word "style" and derivations thereof and respecting plaintiff's federal trademark registration, were part of a good faith effort by plaintiff La Maur Inc. to enforce and protect its trademarks and to prevent confusion as to source, and were not excessive, unfounded or reckless or in furtherance of an attempt to monopolize any relevant market;

2. Defendants failed to establish that plaintiff La Maur Inc. has conspired with any distributor, jobber

or anyone else to prevent the lawful use of the word "style" to describe the nature, quality or character of hair styling or beauty products or the results to be obtained from the use of such products. To the contrary, the evidence showed that plaintiff La Maur Inc. has never objected to the purely descriptive use of "style" and derivatives;

3. Defendants failed to establish that plaintiff La Maur Inc. has, alone or in concert with others, unlawfully attempted to monopolize and unreasonably restrain trade and commerce in hairstyling and beauty products among the several states; and

4. Defendants failed to carry the burden of establishing the allegations of their third affirmative defense.

The grounds for said motion are that, although the Court in its Memorandum Decision dated June 18, 1973 made several findings and conclusions from which it could be fairly inferred that the Court considered defendants' third affirmative defense and rejected it on the merits, specific supplemental findings rejecting that defense will clarify the Court's decision on that matter beyond dispute. Said motion will be made upon the attached memorandum and upon all the files, records and proceedings herein.

Dated: June 30, 1973.

LEONARD, STREET AND DEINARD
By /s/ HAROLD D. FIELD, JR.
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(Title of Cause.)

MEMORANDUM ORDER

No. 4-70 Civ. 442

The plaintiff has filed a motion for additional findings, to supplement the Court's Memorandum Decision of May 18, 1973.

Plaintiff and defendant have submitted briefs in support of their respective positions.

On all the briefs and proceedings herein,

IT IS ORDERED:

That the following addendum to this Court's Decision of May 18, 1973, be made:

The Court finds that the defendant has failed to establish by a preponderance of the evidence that the plaintiff is guilty of unclean hands as alleged in the Third Affirmative Defense.

August 27, 1973.

/s/ EARL R. LARSON
United States District Judge

SUPREME COURT, U. S.
FILE
SEP 27 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-106

ALBERTO-CULVER COMPANY, LEONARD H. LAVIN & COMPANY AND CAPITOL PACKAGING CO.,
Petitioners,

vs.

LA MAUR, INC.,
Respondent.

PETITIONERS' REPLY BRIEF

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Of Counsel.

IN THE

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OCTOBER TERM, 1974

No. 74-106

ALBERTO-CULVER COMPANY, LEONARD H. LAVIN & COMPANY AND CAPITOL PACKAGING CO.,
Petitioners,

vs.

LA MAUR, INC.,
Respondent.

PETITIONERS' REPLY BRIEF

I.

RESPONDENT'S BRIEF

In its brief in opposition to the petition for a writ of certiorari, Respondent sets forth two "Questions Presented," which Petitioners believe require a response.

Respondent's first "Question Presented" asserts that Petitioners raise for the first time the public policy question of Respondent's right to monopolize one of the most commonly used words in the hair care industry. Contrary to this assertion, Respondent's right to monopolize the extraordinarily common word "style" has been at issue since the beginning (see Answer and Counterclaim, *infra*, Appendix F, pp. A1-A12) and has been consistently argued at both the trial and appellate court levels.

Cir. July 26, 1974) involving the use of the marks "Condition" and "Curl & Condition" for hair care products (*infra,* Appendix G, pp. A13-A18). This decision presents a clear conflict with the decision of the Court of Appeals for the Eighth Circuit in the present case respecting trademark rights in an extraordinarily common term. In the *Redken* decision, the Court refused to bestow on one party a monopoly in the use of such a common term. The facts in the *Redken* case respecting the widespread use of the term "condition", both descriptively and as a part of third party marks, parallel the facts in the present case respecting the term "style".

III.

CONCLUSION

Petitioners submit that the petition for a writ of certiorari should be granted not only for the reasons previously stated, but also to resolve the clear conflict that exists between the Courts of Appeal for the Eighth and Ninth Circuits on an extremely important commercial issue.

Respectfully submitted,

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APPENDIX F

UNITED STATES DISTRICT COURT
District of Minnesota
Fourth Division

LA MAUR, INC.,
Plaintiff,
vs.
ALBERTO-CULVER COMPANY and LEONARD H. LAVIN & COMPANY,
Defendants.
No. 4-70 Civ. 442.

AMENDED ANSWER AND AMENDED COUNTERCLAIM

Defendants, by their attorneys, answer the Amended Complaint of plaintiff as follows:

COUNT I

1. Defendants admit the allegations of Paragraph 1.

2. Defendant Alberto-Culver Company admits that it is a corporation incorporated under the laws of Delaware, with its principal place of business in Melrose Park, Illinois, and that it is a citizen of Delaware, but defendants deny the remaining allegations of Paragraph 2.

3. Defendant Leonard H. Lavin & Company admits that it is an Illinois corporation with its principal place of business in Melrose Park, Illinois, that it is a citizen of the State of Illinois, that it is doing business in Minnesota, and that it is a subsidiary of Alberto-Culver Company, but defendants deny the remaining allegations of Paragraph 3.

4. Defendants admit the allegations of Paragraph 4.

5. Defendants admit that plaintiff used the word "Style" since long prior to defendants' use of "Blondes American Style," but defendants specifically deny any imitation of plaintiff's use of the word "Style" and are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 5 and, therefore, deny the same.

6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 6 and, therefore, deny the same.

7. Defendants deny the allegations of Paragraph 7.

8. Defendants are without knowledge or information sufficient to form a belief as to plaintiff's allegations regarding registration and use of its trademarks, but defendant Alberto-Culver admits that it was aware of plaintiff's claim of ownership in the word "Style" prior to said defendant's first sale of the product "Blondes American Style," and defendants deny the remaining allegations of Paragraph 8.

9. Defendants deny the allegations of Paragraph 9.

10. Defendants deny the allegations of Paragraph 10.

COUNT II

11. Defendants reallege their answers to Paragraphs 1 through 5 of Count I.

12. Defendants admit the allegations of Paragraph 12.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in the first two sentences of Paragraph 13 and, therefore, deny the same, and defendants specifically deny the remaining allegations of said paragraph.

14. Defendant Leonard H. Lavin & Company denies that it is engaged in the business of manufacturing any hair prepara-

tions, including the product "Blondes American Style," and defendants deny that the product "Blondes American Style" is in competition with plaintiff since plaintiff sells no such product, but defendants admit the remaining allegations of Paragraph 14.

15. Defendants deny the allegations of Paragraph 15.

16. Defendants deny the allegations of Paragraph 16.

17. Defendants deny the allegations of Paragraph 17.

18. Defendants deny the allegations of Paragraph 18.

Affirmative Defenses

I.

For their first separate and complete affirmative defense, defendants aver that:

19. Since long prior to any use of the word "Style" and variations thereof by plaintiff, the word "style" and derivatives thereof such as "stylish," "styling," "styled," "stylist," "stylize," "stylism," "styles," etc. have been and now are widely and commonly used English words having a variety of meanings and shades of meanings which now are and long have been descriptive of the nature, quality and character of hair styling and related products and of the results to be obtained from the use thereof.

20. Since long prior to any use of the word "Style" and variations thereof by plaintiff, English-speaking persons, including those persons in the hair styling and beauty industry, have aptly described the nature, quality, character, use, effect, and results of the use of hair styling and beauty products by using the word "style" and derivatives thereof.

21. Because of the aforesaid descriptive significances, connotations, meanings and nature of the word "style" and derivatives thereof in connection with hair styling and beauty products and as a result of the aforesaid descriptive use of the word "style"